IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 7795 OF 2005

Miss Piroza Nowroji Deboo
(since deceased) through
Mrs. Homai Faredoon Modi ... Petitioner

V/s

Noshir Phoroze Khambatta ... Respondent

Mr. A.K. Abhyankar with Ms. Monica D'Souza for the petitioner.

Mr. Vineet Naik with Mr. Bharat Joshi for the respondent.

CORAM: P.V. KAKADE, J.

DATED: 3RD APRIL, 2006

P.C.:

1. Heard learned counsel for both parties. Perused the record.

2. The petitioner who is plaintiff in R.A.D. declaratory Suit No. 248 of 1982 and defendant in L & C Suit No. 453/478/01 moved Notice No. 4502 of 2004 in both suits to reserve his right of evidence of rebuttal to lead further evidence in L.E. & C. suit.

3. It may be noted that both suits were directed to be adjudicated by leading common evidence as parties were the same and issues involved were interlinked. In R.A.D. suit the issues were to the effect that, whether the plaintiff prove the tenancy of the defendant in respect of the suit premises and whether he was a protected tenant under the provisions of the Bombay Rent Act and if it is so proved, whether he was entitled for declaration of tenancy right in respect of the suit premises.

4. As against this, in L.E. & C. suit, the issues were to the effect that, whether plaintiff proves that defendant was his licensee in respect of the suit premises and whether the license was terminated in proper manner and further whether the plaintiff in that suit was entitled to get possession of the suit premises. There were two other issues to the effect that whether the defendant proves that he was deemed tenant in respect of the suit premises and was protected under the provisions of the Bombay Rent Act.

5. The evidence of both suits were directed to be led commonly and accordingly parties proceeded to lead common evidence.

6. The R.A.D. suit came to be filed in the year 1982, whereas the L.E. & C. suit came to be filed in the year 2001. The defendant in L.E. & C. suit sought to file additional affidavit of common examination-in-chief stating that additional affidavit was effective for both suits. In that suit he stated that he had filed his affidavit of examination-in-chief dated 7.4.2003 as plaintiff in R.A.D. Suit No. 248 of 1982 and the facts, evidence and documents produced in that suit in his defence in that suit were common. He had produced alongwith his affidavit of examination-in-chief in R.A.D. Suit No. 248 of 1982 all the relevant documents and further requested that those may be considered as his defence in L.E. & C. suit. He further stated that he reserves his right to lead evidence and produced documents in rebuttal in L.E. & C. suit. This aspect of reserving the right of leading evidence in rebuttal is the bone of contention between the parties in this writ petition.

7. After hearing both parties, the Trial Court came to the conclusion that the plaintiff’s right to lead evidence in rebuttal is justified and especially when he has reserved his right at the proper stage and, as such,

the notice was made absolute. Hence the present petition.

8. At the outset, it may be noted that provision of Order 18 Rule 3 of C.P.C. stipulates that, where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case. The learned counsel for the respondent submits that this provision of Order 18 Rule 3 would not be applicable when cross suits are involved as in the present petition. However, it must be noted that, even though the cross-suits are there, the Trial Court, by consent of the parties, has directed to lead common evidence in both suits and, therefore, even though the separate issues are framed, those are essentially to be answered by respective parties by leading common evidence and, therefore, in my considered view, the

provision of Order 18 Rule 3 would be the guiding principle for our purpose.

9. Turning to the matter at hand, as noted earlier, by way of additional affidavit, the respondent had stated that he had reserved his right to lead evidence and produced documents in rebuttal in L.E. & C. Suit and taking the clue from this statement the learned Trial Judge has come to the conclusion that when the respondent has reserved his right to lead evidence in rebuttal at proper stage, the opportunity to lead evidence in rebuttal to the evidence led by the plaintiff in L.E. & C. suit cannot be denied to the defendant in R.A.D. suit. According to the Trial Court, no harm and prejudice will be caused to the plaintiff in L.E. & C. suit if the defendant is allowed to lead evidence in rebuttal. The learned counsel for the respondent has made statement today that he would not enter the witness box and all the evidence in rebuttal is intended to be led is in respect of documents and other witnesses only to the confined issues relating to the deposit of rent in the bank account and leave and licence.

10. On the other hand, the learned counsel for the

petitioner submitted that this is nothing but an attempt to fill in the lacunas on the part of the present respondent and, therefore, the order of the Trial Court should be set aside.

11. In my considered view, the trial is in progress and the evidence is being led by the concerned parties and if the evidence ia allowed to be led in rebuttal, the petitioner would have every opportunity to cross-examine the witnesses and challenge the documents which may be produced by the present respondent in connection with this matter by way of evidence in rebuttal and, therefore, no prejudice is, therefore, likely to be caused to the petitioner.

12. Under the circumstances, I do not see any illegality or perversity in the order passed by the Trial Court while making the notice absolute.

13. In the result, the petition is devoid of any merits and, therefore, stands dismissed with no order as to costs.

14. The trial Court is directed to expedite the hearing of the matter as one of the suit is of the year 1982.

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